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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY BROWN,

Defendant and Appellant.

A150891

**(Solano County
Super. Ct. No. FCR316846)**

A jury convicted Jeremy Brown of aggravated sexual assault of a child by means of forcible rape (Pen. Code, § 269, subd. (a)(1); count 1),¹ aggravated sexual assault of a child by means of forcible sodomy (§ 269, subd. (a)(3); count 2), and two counts of aggravated sexual assault of a child by means of forcible oral copulation (§ 269, subd. (a)(4); counts 3, 4). The trial court sentenced Brown to 60 years to life in prison.

Brown appeals. Brown challenges the court's admission of uncharged sexual acts evidence, and its admission of evidence of his sexual fetishes. Brown challenges a number of jury instructions, and he argues the court erred by failing to instruct the jury in various ways. Brown contends the district attorney engaged in prosecutorial misconduct. He challenges the court's restitution fine, its failure to award presentence conduct credits, and he argues he is entitled to a remand to preserve a record for his eventual youth

¹ All undesignated statutory references are to the Penal Code.

offender parole hearing. If these arguments are forfeited, Brown contends his trial counsel provided ineffective assistance.

We agree with Brown that he is entitled to 76 days of conduct credits. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts relevant to the issues on appeal. We provide additional factual and procedural details in the discussion of Brown's specific claims.

The operative information charged Brown with one count of aggravated sexual assault of a child—forcible rape (§§ 269, subd. (a)(1), 261, subds. (a)(2) & (a)(6); count 1); one count of aggravated sexual assault of a child—forcible sodomy (§§ 269, subd. (a)(3), 286; count 2); and two counts of aggravated sexual assault of a child—forcible oral copulation (§ 269, subd. (a)(4), § 288a; counts 3, 4).²

A. *The Victim's Testimony Regarding the Charged Offenses*

At the time of her testimony, J.N. (J.) was 18 years old. J. lived with her grandparents. J.'s grandparents adopted Brown and his sister, who was J.'s mother. J.'s mother had three children. J. resided in the house with her siblings and her uncle, Brown. J. testified Brown was about 12 or 13 years older than her.³ J.'s mother had passed away before trial.

Brown began sexually abusing J. when she was four or five years old and he stopped when she was about seven. The first incident occurred around the time of J.'s fifth birthday party. One night, around this time, Brown told J. to come into the

² The prosecution alleged Brown's crimes occurred "between September 1, 2003 and September 30, 2005." Consistent with the version of section 269 in effect at the time, counts 2, 3 and 4 refer to Brown being more than 10 years older than the victim. (Stats. 1993–1994, 1st Ex. Sess., ch. 48, § 1, p. 8761.) Section 269 was amended in 2006 to criminalize the conduct when committed by someone seven or more years older than the victim. (Stats. 2006, ch. 337, § 6, p. 2589.) Count 1 refers to Brown being seven or more years older than the victim, but we presume the prosecution meant to refer to him being more than 10 years older.

³ In fact, Brown was born on September 10, 1984, making him 14 years older than J.

bathroom with him. Brown pulled down J.'s pants, asked her to put her hands on the toilet and to bend over. Brown told her not to turn around. J. felt something "poke" a cheek of her buttocks. Sometimes, Brown's penis went inside her vagina "just a little bit," and it also went slightly inside her anus. J. felt pain, and she sometimes bled, when Brown put his penis in her vagina and anus. J. felt a wet substance with the consistency of semen on her buttocks, but not inside her. A similar incident occurred about 20 times.

J. did not want Brown to engage in this conduct in the bathroom, and he did so without her consent and against her will. J. did not tell Brown to stop because he was a violent person, an alcoholic, and she did not want to make him angry. J. was afraid Brown would yell at her or hurt her if she told him to stop. J. had no choice because Brown was much older than her, and she had been taught to respect her elders.

When J. was about five and one-half years old, Brown began coming into her bedroom in the middle of the night, laying on her bed, and removing J.'s blankets. Brown moved J.'s nightgown up above her chest, pulled down her underwear, and licked her vagina and anus. J. experienced "a disgusting, slimy feeling." Brown came into her bed and engaged in this conduct between 20 and 30 times. When Brown did so, he did not ask for J.'s consent, and she did not want him to do it. J. was concerned Brown would become violent if she told him to stop. When Brown was finished, he fell asleep in J.'s bed. J. moved to the floor.

In the bedroom, when J. was around five and one-half years old, Brown blindfolded her with a towel. Brown told her not to move the towel, to open her mouth, and that he had a "surprise." J. heard "fast movements" and felt something on her face. J. felt something "pointy" touch the sides of her mouth and her cheeks. J. believed it was Brown's penis. She tasted something like "salty goo" on her lips and cheeks.

Brown blindfolded J. between 10 and 15 times. On one of those occasions, Brown put his penis to her face, but the other times he would lick her on her private parts. J. did not want Brown to do it, and it was without her consent, and against her will. J. remembers shaking her head "a couple of times and like backing up, but that didn't stop him." Brown continued "to do what he wanted."

Brown's abuse stopped when J. was six or seven. She did not know why. When J. was seven, she told two neighbors about the abuse. A day or two later, J.'s grandmother asked her about it. J. told her grandmother that Brown licked her, but her grandmother did not believe J., and she told J. she was " 'just having dreams,' " and not to talk about it. The next day, or a few days later, her grandmother told J. she was lying. J. "didn't talk about it ever again." It made J. feel "[u]nimportant" to know her grandmother did not believe her.

B. *The Victim's Testimony Regarding Other Acts*

J. recalled that, when she was blindfolded, Brown put his hands on her hands, and he moved her hands on his penis. Brown did so about five times. When he did so, Brown's penis was erect. Brown touched J.'s chest, her buttocks, and her feet. Brown licked her feet and toes. Brown touched J.'s vagina, and he put his fingers inside her vagina about ten times. Brown touched J.'s anus. J. never asked Brown to do these things to her, she did not want it to happen, and it was always without her consent and against her will. J. was concerned about what would happen if she said "no" to Brown.

When J. was about six years old, Brown cut her buttocks with a knife. Brown was drunk, and he cut her because he had woken her up, she was sleepy, and she was not complying quickly enough with what he wanted her to do. This incident occurred in J.'s room in the middle of the night. After he cut her, Brown touched J.'s private parts. When Brown left, J. locked herself in the bathroom. She cried and tried to clean the wound.

J. recalled other "creepy" incidents. When J. was about 14 years old, she found her bra under Brown's pillow. When J. was 16 years old, she noticed that someone had rummaged through her underwear. While in the shower, J. would crack the window to let out steam, but sometimes she heard footsteps outside the bathroom and had to close the window. She believed it was Brown. Brown would sit on the couch where he had a view of J. and her sister coming out of the bathroom after a shower and going to their bedroom. Someone tried to drill a hole in the wall between J.'s bedroom and the bedroom occupied by Brown, but J.'s brother plugged the hole.

When J. was about 15 years old, Brown crawled on his hands and knees into her bedroom, but he left when he realized J. was awake. About 15 or 20 minutes later, Brown came back and tried to touch J., but she stopped him, and he left.

C. *The Investigation and Brown's Admissions to Police*

After J.'s mother passed away, J. wrote a letter to her father describing Brown's sexual abuse, and J. gave the letter to her school counselor, who called Child Protective Services. The same day, J. met with a sheriff's deputy and a social worker.

J.'s grandmother told a detective she did not believe J., and she accused J. of "spreading shit." J. was removed from the custody of her grandparents, and she had been living with her father for the year before Brown's trial.

Based on J.'s statement to police, the police took Brown into custody and interviewed him.⁴ When the police told Brown that J. said he had touched her inappropriately, Brown responded he was going to jail and he was going to die. Brown said he had an alcohol problem, but he did not "blame it on the alcohol." Brown regretted what he did to J., described himself as a "[f]ucking God damn piece of shit," and he said he "knew this had to be something big." Brown worried about his parents disowning him, about being kicked out of the house, and about being labeled "a child molester."

Brown stated he was drunk, a "sex addict," and he did not remember much of what happened. At first, Brown stated he touched J.'s feet and her legs. Brown denied having sexual intercourse with J., but, later in the interview, he said if J. said he did things to her, "I can't say that I didn't." Brown stated, "I cuddled with her, I touched her and kissed her but I've never had sex with her. It was just usually [I would] go in the room and I'd see her feet hanging off. That sounds so . . . gross. . . . I can't even say it." Brown refused to take a lie detector test because he worried it would show he was a child molester and "that I did everything in the fucking world to her"

⁴ Excerpts from the video recording of Brown's interview were played for the jury and admitted into evidence.

Brown admitted he “masturbate[d] to her and touch[ed] her ass and legs and . . . [gave J.] foot massages.” When asked if J.’s mouth touched his body, Brown responded, “I wouldn’t doubt it.” Brown stated it was possible his penis touched J.’s body. Later, Brown admitted he masturbated on J. three or four times that he could remember. He also admitted placing his fingers in J.’s vagina.

Brown initially said he did not remember having oral sex with J., but, later in the interview, he stated he orally copulated J. once, and she orally copulated him twice. Brown stated he did not think he had anal sex with J., but, in the state of mind he was in at the time, he could “visualize” himself doing so, and he probably did so. Later, Brown admitted he had anal sex with J.

Brown had a foot fetish and a sleeping fetish, which he described as masturbating while watching a girl sleeping. Brown also talked about a bondage fetish, and he admitted blindfolding J. Brown stated the first incident involved him masturbating to J.’s feet while she was asleep. Brown said “I get off on seeing her feet.” Brown made J. put on a blindfold “and I would have her like jerk me off,” and he also made J. give him oral sex while she was blindfolded.

These incidents occurred when J. was about four or five years old and they ended when she was about six or seven. Brown recalled how the incidents stopped. He stated he went into J.’s room one night when he was not drunk and he was going to “masturbate to her” but he stopped, acknowledging “something’s not right here.”

Brown wondered if J. was too young to remember what happened, and said he had “an alcoholic memory.” It was difficult for Brown to realize what he had done. Brown stated, “I guess I just kept getting hornier and hornier and hornier like the piece of shit that I am, and—it fucking progressed from there.” When asked why he chose J., Brown stated she was an “[e]asy target probably—just in the house.”

D. *The Testimony of J.’s Grandmother*

J.’s grandmother did not want Brown to be convicted. When J. was seven years old, J. told her grandmother Brown was “messaging” with her, but the grandmother told J. she was probably dreaming. J.’s grandmother confronted Brown, who denied he did

anything inappropriate. J.'s grandmother took no further action regarding J.'s allegations. J.'s grandmother did not feel Brown was the type of person who would molest J. J.'s grandmother did not know who to believe. She stated, "[J.] is my granddaughter; I love her. That's my son. I love him. Now you are trying to make me take sides between my family."

E. *Verdict and Sentence*

A jury found Brown guilty of aggravated sexual assault of a child by means of forcible rape (§ 269, subd. (a)(1); count 1), aggravated sexual assault of a child by means of forcible sodomy (§ 269, subd. (a)(3); count 2), and two counts of aggravated sexual assault of a child by means of forcible oral copulation (§ 269, subd. (a)(4); counts 3, 4). The court sentenced Brown to 15 years to life on each count, resulting in a total sentence of 60 years to life in prison.

DISCUSSION

I.

The Court Did Not Err By Admitting Propensity Evidence

Brown's first argument is "[t]he trial court erred by admitting evidence of several uncharged incidents of alleged sexual assault by Brown against [J.] contemporaneous and subsequent to the charged incidents." According to Brown, the court's decision to admit this evidence deprived him of his right to due process, and constituted an abuse of discretion. We disagree.

A. *The Motion in Limine*

Prior to trial, the district attorney filed a motion in limine requesting admission of evidence of uncharged sexual offenses, as well as evidence of Brown's inappropriate conduct toward J. The district attorney sought to admit the evidence under Evidence Code sections 1108 and 1101, subdivision (b). Brown objected.

At the hearing on the motion, the district attorney argued the uncharged acts included Brown's digital penetration of J., Brown forcing J. to masturbate him, and Brown's touching of J.'s body. The district attorney argued this conduct constituted propensity evidence admissible to show Brown's proclivity to engage in illicit sexual

conduct. Brown responded that admitting this evidence was improper because these incidents were alleged to have occurred during the same time period as the charged offenses, and the burden of proof is lower for propensity evidence. The court ruled that evidence of other crimes occurring during the same time frame as the charged offenses was admissible under Evidence Code section 1108, and that evidence of later offenses was admissible under Evidence Code sections 1108 or 1101, subdivision (b).

B. *Governing Law and Standard of Review*

Generally, “evidence of a person’s character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion.” (Evid. Code, § 1101, subd. (a).) However, “[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, § 1108, subd. (a).) Under Evidence Code section 352, “[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice” Prejudice in this context means evidence that “ ‘ “uniquely tends to evoke an emotional bias against the defendant as an individual” ’ ” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

“[T]he Legislature enacted [Evidence Code] section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) “[T]he Legislature’s principal justification . . . was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. . . . Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant’s possible disposition to commit sex crimes.” (*Falsetta*, at p. 915.)

The admissibility of uncharged sexual misconduct is entrusted “ ‘to the sound discretion of the trial judge who is in the best position to evaluate the evidence.’ ” (*Falsetta, supra*, 21 Cal.4th at pp. 917–918.) We review the court’s ruling for an abuse

of discretion, and we may reverse the ruling only if it is “ ‘ ‘arbitrary, capricious, or patently absurd[.]’ ’ ” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

C. *No Due Process Violation*

On appeal, Brown argues the court’s admission of evidence of uncharged sex offenses under Evidence Code section 1108 violated his right to due process. As Brown acknowledges, however, the California Supreme Court rejected this argument in *Falsetta*, *supra*, 21 Cal.4th at page 922. As Brown also recognizes, we are not at liberty to disregard our high court’s decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

Moreover, almost every case Brown cites in support of his due process argument predates *Falsetta*, and thus Brown cannot argue these authorities have undermined the case. To the contrary, the California Supreme Court has expressly declined to reconsider its decision in *Falsetta*. (*People v. Lewis*, *supra*, 46 Cal.4th at pp. 1288–1289 [“We decline defendant’s invitation to reconsider our decision in *Falsetta*”]; *People v. Loy* (2011) 52 Cal.4th 46, 60–61 [declining to reconsider the constitutionality of Evidence Code section 1108 and adhering to *Falsetta*].)

D. *No Abuse of Discretion*

In arguing the court abused its discretion, Brown argues J. was “the progenitor of both the charged and uncharged offenses,” so there was no independent, corroborating source for the evidence of uncharged offenses. Brown argues that “none of the published opinions involve a situation like the present [one] where the alleged uncharged acts were committed against the same individual making the charges in the case.”

We are not persuaded. In *People v. Ennis* (2010) 190 Cal.App.4th 721 (*Ennis*), the court acknowledged that evidence from the same witness regarding other uncharged sexual offenses had only “slight” probative value. (*Id.* at p. 733.) Nonetheless, the court concluded the prejudicial impact of the evidence did not substantially outweigh its probative value because it did not make the defendant “look significantly worse” or make the alleged conduct underlying the charges “appear significantly more egregious, than it already did.” (*Ennis*, at p. 734.)

The same reasoning applies here. J. testified Brown put his penis inside her vagina and anus about 20 times. J. testified that Brown licked her vagina and anus between 20 and 30 times. J. also testified regarding additional acts whereby Brown forced J. to masturbate him, or touched her body, or put his fingers inside her vagina. The prejudicial impact of this additional evidence did not substantially outweigh its probative value because it did not make Brown “look significantly worse” than he already did based on J.’s testimony regarding the charged offenses. (*Ennis, supra*, 190 Cal.App.4th at p. 734.) Accordingly, the court did not abuse its discretion in admitting the evidence of uncharged offenses.

In arguing otherwise, Brown relies on *People v. Harris* (1998) 60 Cal.App.4th 727 (*Harris*), but the case is inapposite. In *Harris*, the jury heard an incomplete and distorted account of an offense that occurred 23 years earlier, and the appellate court concluded this evidence should have been excluded because “[t]his altered version of a 23-year-old act of inexplicable sexual violence . . . was not particularly probative of the defendant’s predisposition to commit [the charged] ‘breach of trust’ sex crimes.” (*Id.* at pp. 740–741.) Here, unlike in *Harris*, the evidence of Brown’s uncharged acts of touching J., or digitally penetrating her, or forcing her to masturbate him was not “totally dissimilar” to the charged offenses. (*Harris, supra*, at p. 740.)

Moreover, “the uncorroborated testimony of the complaining witness” can be relevant “to place the charged offenses in context.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 408.) J.’s testimony regarding uncharged offenses helped paint a vivid picture of a pattern of sexual abuse that occurred over a two-year period. Applying Evidence Code section 1108, it was reasonable for the court to conclude this evidence was probative of Brown’s disposition to commit the charged offenses, and that its prejudicial impact did not substantially outweigh its probative value. (*Ennis, supra*, 190 Cal.App.4th at pp. 734–735.)

E. *Any Error Was Harmless*

Even if the court abused its discretion in admitting evidence of uncharged sex offenses, the error was harmless. The admission of this evidence is tested for prejudice

under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659.) Here, it is not reasonably probable Brown would have obtained a more favorable result if the jury did not hear J.’s testimony regarding other uncharged offenses because, in his police interview, Brown admitted he forced J. to masturbate him, he admitted touching her body, and he admitted placing his fingers in J.’s vagina. We reject Brown’s suggestion he made his admissions under “extreme duress.” Hence, as the Attorney General points out, Brown’s “own statements corroborated J.’s testimony.”

Brown argues he was unduly prejudiced by the admission of evidence “he continued to sexually harass” J. when she was older. But the court ruled the evidence of inappropriate conduct that occurred when J. was older—including J. finding her bra under Brown’s pillow, and Brown coming into J.’s bedroom to try to touch her—was admissible under Evidence Code section 1101, subdivision (b), because it was probative of the motive for his earlier conduct, and his sexual interest in J.⁵ The court ruled that Brown’s conduct in trying to peek on J. in the shower or in her bedroom was admissible under Evidence Code sections 1108 or 1101, subdivision (b). On appeal, Brown does not challenge the court’s admission of evidence under Evidence Code section 1101, subdivision (b). As a result, any error in admitting the evidence under Evidence Code section 1108 was harmless.

II.

The Court Did Not Err by Admitting Evidence of Brown’s Sexual Fetishes

Brown argues he was “deprived of a fair trial” by the court’s admission of evidence of his sexual fetishes. We disagree.

A. *The Motion in Limine*

⁵ Evidence Code section 1101, subdivision (b) provides that “[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act.”

Before trial, the prosecution moved to admit evidence of Brown's foot fetish, his sleeping fetish, and his bondage fetish. The prosecution argued the evidence was admissible under Evidence Code section 1101, subdivision (b) to show Brown's sexual interest in J. and his motive for committing sex crimes against her. The court found the evidence was admissible.

B. *Governing Law and Standard of Review*

"Evidence that a person committed a crime, civil wrong, or other act may be admitted . . . not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or motive." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095, citing Evid. Code, § 1101, subd. (b).) This evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will be unduly prejudicial." (*People v. McCurdy*, at p. 1095 citing Evid. Code, § 352.) Prejudice in this context "refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial." (*Ibid.*) We review a ruling under Evidence Code section 352 for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.)

C. *No Abuse of Discretion*

Brown contends the evidence of his sexual fetishes, "most of which were not directly related to the alleged forcible rape, sodomy and oral copulation charged in this case, was minimally probative," and unduly prejudicial. We disagree.

Brown told police he had a "foot fetish" and "a sleeping fetish," which he described as masturbating while watching a girl sleeping. Brown stated the first incident with J. involved masturbating to her feet while she was asleep. Brown said "I get off on seeing her feet." Brown also told police about his bondage fetish, and he admitted blindfolding J. Brown stated he had J. masturbate him, and orally copulate him while she was blindfolded. Thus, Brown's statements regarding these fetishes were relevant because they helped explain his sexual interest in J., or the motive for his behavior.

In addition, Brown's statements regarding his foot fetish were relevant to corroborate J.'s testimony that Brown touched her feet, "sometimes lick[ed] them," and

licked her toes. Brown’s statements regarding his sleeping fetish corroborated J.’s testimony that he often came into her bed at night to abuse her. Brown’s statements regarding a bondage fetish corroborated J.’s testimony that Brown blindfolded her with a towel and masturbated while she was blindfolded. Indeed, Brown concedes his “description of his sexual fetishes during his police interview had some minimal probative value in corroborating [J.’s] claims”

Like the court in *Ennis, supra*, 190 Cal.App.4th at p. 734, we are confident that whatever “emotional bias” Brown’s statements regarding his fetishes might have tended to invoke against him was nugatory, given J.’s testimony regarding his abuse and Brown’s own admissions. The court did not abuse its discretion in admitting Brown’s statements, so we do not address his argument that the error was prejudicial. We also reject Brown’s cursory and unexplained contention that the court’s admission of this evidence violated his federal due process rights.

III.

The Jury Instruction on Uncharged Offenses Was Not Unconstitutional

Brown argues the court’s jury instruction based on a modified version of CALCRIM No. 1191 was “constitutionally infirm because it interfered with the presumption of innocence and allowed the jury to infer guilt and to make a finding based on a standard of proof less than beyond a reasonable doubt.” We disagree.

A. *The Jury Instruction*

The jury was instructed that the People “presented evidence that the defendant committed the crime of lewd act on a child that was not charged in this case. This crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense,

you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit Aggravated Sexual Assault as charged in Counts 1, 2, 3 and 4, or of Rape by force or fear, Sodomy by force or fear, or Oral Copulation by force or fear, which are lesser included offenses thereto. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Aggravated Sexual Assault as charged in Counts 1, 2, 3 and 4, or of Rape by force or fear, Sodomy by force or fear, or Oral Copulation by force or fear, which are lesser included offenses thereto. The People must still prove each charge beyond a reasonable doubt.”

B. *No Violation of Brown’s Right to Due Process*

Brown argues this jury instruction violated his right to due process. However, as Brown recognizes, in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1016, the California Supreme Court held a former version of this instruction correctly stated the law and did not violate due process. Brown also acknowledges that in *People v. Cromp* (2007) 153 Cal.App.4th 476 (*Cromp*), the court concluded there was “no material difference” between the former instruction and CALCRIM No. 1191, and it rejected a due process challenge to the new jury instruction. (*Cromp*, at p. 480.) Our Supreme Court cited *Cromp* with approval in *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160. We reject Brown’s constitutional challenge to the instruction. (*Auto Equity, supra*, 57 Cal.2d at p. 455.)

In seeking to distinguish his instruction from the one upheld by our Supreme Court in *People v. Reliford*, Brown takes issue with his instruction’s use of the word “conclude” instead of “infer.” We reject Brown’s contention that the jurors would have understood the terms differently. (American Heritage Dict. (4th ed. 2000) p. 382 [defining “conclude” as “[t]o arrive at (a logical conclusion or end) by the process of reasoning; infer on the basis of convincing evidence”], p. 897 [defining “infer” as “[t]o conclude from evidence or premises”].) Moreover, the instruction upheld in *Cromp* also

used the word “conclude” instead of “infer.” (*Crompt*, *supra*, 153 Cal.App.4th at pp. 479–480.) We agree with *Crompt* that this difference is immaterial.

Brown contends the instruction deprived him of the presumption of innocence. But, in *People v. Reliford*, *supra*, 29 Cal.4th at page 1013, the instruction cautioned that prior act evidence was “ ‘not sufficient by itself to prove beyond a reasonable doubt that [the defendant] committed the charged crime.’ ” Based on this language, our Supreme Court concluded that reasonable jurors would understand they could not convict based on propensity evidence alone. (*Ibid.*) Similarly here, the instruction stated the evidence of uncharged sex offenses was “not sufficient by itself to prove” the charged offenses, which had to be proved “beyond a reasonable doubt.” Thus, we reject Brown’s assertion the jurors were free to determine “the amount of weight” to give to the evidence of uncharged offenses. In addition, the jurors were separately instructed regarding the presumption of innocence, and the People’s burden of proof beyond a reasonable doubt. Because the instruction was not erroneous, we do not address Brown’s arguments that the error requires reversal or that he was prejudiced by it.

IV.

The Court Did Not Err by Failing to Instruct the Jury on Brown’s Proposed Lesser Included Offenses

A. The Jury Instructions on Lesser Included Offenses

Based on CALCRIM No. 1123, the jury was instructed that Brown was charged in count 1 with aggravated sexual assault of a child by means of forcible rape (§ 269, subd. (a)(1)); in count 2 with aggravated sexual assault of a child by means of forcible sodomy (§ 269, subd. (a)(3)); and in counts 3 and 4 with aggravated sexual assault of a child by means of forcible oral copulation (§ 269, subd. (a)(4)).

When considering proposed jury instructions, and relying on CALCRIM Nos. 1080 and 1090, defense counsel requested instructions on the “lesser-related” offenses of oral copulation of a child under 14 years of age (former § 288a, subd. (c)(1)), and sodomy of a child under 14 years of age (§ 286, subd. (c)(1)). Defense counsel argued

the jury could find Brown sodomized J. and engaged in acts of oral copulation with her, but that he did not “use force, violence, duress or menace.”

The court denied the request, finding no “compelling reason” to instruct on Brown’s proposed lesser related offenses. Instead, the court determined it would instruct the jury on forcible rape as a lesser included offense to the charge of aggravated sexual assault by means of rape (CALCRIM No. 1000); forcible sodomy as a lesser included offense to the charge of aggravated sexual assault by means of sodomy (CALCRIM No. 1030); and forcible oral copulation as a lesser included offense to the charges of aggravated sexual assault by means of oral copulation (CALCRIM No. 1015).

The court also determined it would instruct the jury on simple battery as a lesser included offense to the charges in counts 1 to 4 and their lesser included offenses (CALCRIM No. 960). Finally, the court determined it would instruct the jury on simple assault as a lesser included offense to simple battery (CALCRIM No. 915). The court stated the instructions on battery and assault gave the jury “a place to go” if they believed the evidence was insufficient on an element of the charged offenses.

B. Brown’s Proposed Instructions on Lesser Included Offenses Were Not Supported By Substantial Evidence

According to Brown, there was “substantial evidence . . . to support an instruction on the lesser offenses of unlawful sexual intercourse, sodomy with a minor and oral copulation with a minor.” We disagree.

“ ‘A criminal defendant is entitled to an instruction on a lesser included offense only if . . . “there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense” . . . *but not the lesser.*’ ” (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.] ‘Substantial evidence’ in this context is ‘ “evidence from which a jury composed of reasonable [persons] could . . . conclude[]” ’ that the lesser offense, but not the greater, was committed.”

(*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “ ‘ “On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.” ’ ” (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

At the time of Brown’s offenses (between 2003 and 2005), the crime of aggravated sexual assault of a child by means of rape required proof the act of rape was “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (Former § 269, subd. (a)(1), former § 261, subd. (a)(2).)⁶ Similarly, the crimes of aggravated sexual assault of a child by means of sodomy and oral copulation required proof the perpetrator committed the acts “by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (Former § 269, subds. (a)(3), (4).)

The Attorney General concedes the crimes of unlawful sexual intercourse with a person under 18 years of age (§ 261.5), oral copulation with a person under 18 years of age (former § 288a, subd. (b)(1)), and sodomy with a minor (§ 286, subd. (b)(1)), are lesser included offenses to the charged offenses of aggravated sexual assault of a child because Brown could not have committed the charged offenses without also committing these lesser offenses. The difference between the greater offenses and Brown’s proposed lesser ones is that the lesser offenses do not require proof of the use of force or fear. Nonetheless, the Attorney General argues the court had no duty to instruct on these lesser included offenses because, based on the evidence, no reasonable juror could conclude Brown did not use force or fear when engaged in the charged conduct. We agree.

J. was about five years old when Brown began to sexually abuse her. J. testified that Brown pulled down her pants, told her to place her hands on the toilet, to bend over, not to turn around, and he proceeded to rape or sodomize her. J. testified that Brown

⁶ The version of section 269 in effect at the time of Brown’s crimes was added to the Penal Code in 1994. (Stats. 1993–1994, 1st Ex. Sess., ch. 48, § 1, p. 591.) The version of section 261 in effect was added in 2002. (Stats. 2002, ch. 302, § 2, p. 1200.)

came into her bedroom, took off her blanket, pulled down her underwear, and orally copulated her. These acts of positioning the body of this child were sufficient to establish Brown used “force” to commit the charged conduct. (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1205–1206 [defendant’s act of pulling down the victim’s underwear and rolling his body on top of a six-year-old child were sufficient acts of force to support the jury’s finding of forcible sexual penetration].) Moreover, the amount of force required is simply the “use of force sufficient to overcome the victim’s will.” (*People v. Guido* (2005) 125 Cal.App.4th 566, 576; *People v. Hale* (2012) 204 Cal.App.4th 961, 978.) J. expressly testified Brown engaged in acts of rape, sodomy and oral copulation against her will.

In addition, no reasonable juror could conclude J. was not fearful of Brown. She did not tell Brown to stop raping, sodomizing, or orally copulating her because she believed he was “a violent person,” an “alcoholic,” and she did not want Brown to get angry with her. J. felt like she had no choice. She had been taught to respect her elders. J. also testified Brown cut her with a knife when she did not comply quickly enough with what he wanted her to do.

We reject Brown’s spurious assertions that “the evidence regarding force, duress, violence, etc. was not particularly strong,” or that J.’s testimony “failed to describe any force, violence or duress.”⁷ No reasonable juror could conclude that Brown committed the lesser offenses that he proposes, but not the greater ones. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) In other words, it is not reasonable to conclude Brown engaged in acts of sexual intercourse, sodomy and oral copulation with J. when she was between five and seven years old, but that the acts were *not* accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (Former § 269, subds. (a)(1), (a)(3), (a)(4); former § 261, subd. (a)(2).) The court did not

⁷ In his reply brief, Brown claims “[J.] herself acknowledged that Brown never hit, kicked or used any physical force against her, and he also never threatened her.” His citation to the record does not support this claim.

err by failing to instruct on Brown’s proposed lesser included offenses, so we do not address Brown’s argument he was prejudiced by the error.

V.

The Prosecutor’s Challenged Remarks Did Not Prejudice Brown

Brown contends the prosecutor engaged in misconduct during closing arguments. Brown forfeited this argument by failing to object, and the error, if any, was harmless.

A. *The Prosecutor’s Remarks*

After the court finished reading its instructions to the jury, the prosecutor began her closing argument: “The tragic thing—or one of the tragic things about taking a case like this, a child molestation case, to court, to trial, is that the victim, in this case [J.], has to come up here and take the stand and relive and talk about these horrible things that happened to her. [¶] She’s asked to go back in time and remember and describe, in perhaps greater detail than ever before, these sexual molestations the defendant committed against her and essentially be re-victimized. And after she does this and takes the stand and relives this trauma, the defense then essentially says she’s not a victim [of] these heinous crimes.”

Defense counsel did not object to these remarks. Instead, during defense counsel’s closing argument, defense counsel pointed out that even though the jurors may “feel compassion for [J.],” they should not “decide this case based [on] emotion.”

B. *Governing Law*

A prosecutor’s behavior violates the federal Constitution when it comprises an egregious pattern of conduct that infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

“ ‘Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ’ ’ ” (*Ibid.*)

“We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt.” (*People v. Stansbury* (1993)

4 Cal.4th 1017, 1057, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318, 325–326; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [misconduct to ask jury to suppose the crime had happened to their children].) “However, prosecutors have wide latitude to present vigorous arguments so long as they are a fair comment on the evidence, including reasonable inferences and deductions from it.” (*People v. Leon* (2015) 61 Cal.4th 569, 606.)

C. *Brown Failed to Object*

Brown argues the prosecutor’s remarks constitute prosecutorial misconduct. The Attorney General responds the claim is forfeited because defense counsel did not object. As a general rule, “ “[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected . . . and . . . requested that the jury be admonished to disregard the perceived impropriety.” ’ [Citations.] The defendant’s failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct.” (*People v. Centeno* (2014) 60 Cal.4th 659, 674.)

Here, we cannot say an objection to the prosecutor’s remarks regarding J.’s revictimization would have been futile or that any prejudice could not have been cured by admonition. The failure to object, therefore, resulted in forfeiture. However, Brown also argues the failure to object resulted in ineffective assistance of counsel. To forestall this argument, we address the merits of Brown’s claim.

D. *Brown Suffered No Prejudice*

Brown argues that “[b]y focusing on the youthful victim and her ‘re-victimization’ by having to go through a trial, the district attorney not only appealed to the jury’s natural sympathy for the child but implicitly blamed Brown for this additional suffering due to the exercise of his constitutional right to a trial.” Assuming, without deciding, that the prosecutor’s remarks regarding J.’s revictimization were improper, we are not persuaded Brown suffered prejudice. The remarks were brief and isolated, so they did not amount to “a pattern of [mis]conduct” that rendered the trial fundamentally unfair and a denial of due process. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) Instead, we consider whether

it is reasonably probable Brown would have obtained a more favorable outcome absent the error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Here, J. testified that Brown raped and sodomized her in the bathroom of their home about 20 times. She testified that Brown came into her bedroom and orally copulated her about 20 or 30 times. During his interview with police, Brown admitted orally copulating J., and he stated he made J. perform oral sex on him twice. With regard to anal sex, Brown stated it was something he could “visualize” himself doing, and admitted he did so.

Brown initially denied having sexual intercourse with J., but he also claimed he could not remember, and, later in the interview, he stated that if J. said he did things to her, “I can’t say that I didn’t.” Brown stated he was a “sex addict,” he refused to take a lie detector test, and he described J. as an easy target. Based on this evidence, it is not reasonably probable the outcome would have been more favorable to Brown if the prosecutor had not referred during closing arguments to J.’s revictimization. (*People v. Martinez* (2010) 47 Cal.4th 911, 957 [even if prosecutor’s argument was an improper appeal for sympathy for the victim, the comments were brief, and the evidence of defendant’s guilt was strong, so it was not “reasonably probable that the verdict would have been more favorable to defendant without the misconduct”].)

In addition, shortly before the prosecutor’s closing argument, the jurors were specifically instructed not to let “bias, sympathy, prejudice or public opinion influence [their] decision.” “We presume the jury followed the court’s instructions.” (*People v. Avila* (2006) 38 Cal.4th 491, 573–574.) During defense counsel’s closing argument, she stated that even though the jurors may feel compassion for J., they should not decide the case based on emotion. In rebuttal, the prosecutor emphasized the jurors should consider what J. went through for the purpose of evaluating her credibility. Under these circumstances, it is not reasonably probable the jury would not have convicted Brown, or would have convicted him of lesser offenses, if the prosecutor had not remarked upon the trial revictimizing J.

VI.

The Court Did Not Err by Failing to Instruct on a Defense Based on a Belief in Consent

Brown contends the court should have instructed the jury that his reasonable, good faith belief in consent was a defense. The court has a duty to instruct on this defense if there is “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” (*People v. Williams* (1992) 4 Cal.4th 354; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158.) Brown argues “there was sufficient evidence of equivocal conduct by [J.] to warrant [the] instruction.” We disagree.

A. *The Jury Instructions*

The CALCRIM instructions on forcible rape, forcible oral copulation, and forcible sodomy include optional language stating a defendant is not guilty of the crimes if he actually and reasonably believed the other person consented to the act, that the People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably have this belief, and that the jury must find the defendant not guilty if the People have not met this burden. (CALCRIM Nos. 1000, 1015, 1030.) The court did not include this optional language in the jury instructions. Defense counsel did not object or request the court to do so.

B. *Children Under the Age of 14 Cannot Give Legal Consent to Sexual Acts With Adults*

We discern no error in the court’s failure to include this optional language because “[f]or over 100 years, California law has consistently provided that children under age 14 cannot give valid legal consent to sexual acts with adults.” (*People v. Soto* (2011) 51 Cal.4th 229, 238 (*Soto*).) Brown contends that in *People v. Tobias* (2001) 25 Cal.4th 327, 333 (*Tobias*), the California Supreme Court “recognized minors can give actual consent to sexual acts.” But in *Tobias*, the court was considering a 16-year-old victim of a sex crime (*id.* at p. 329), not a victim, like J., who was between five and seven years old when Brown sexually abused her.

In *Tobias*, our Supreme Court held that “a child under 18 who has an incestuous sexual relationship with an adult is a *victim*, not a perpetrator, of the incest, and this conclusion remains valid even when the child consents to the sex.” (*Tobias, supra*, 25 Cal.4th at p. 329.) In considering the question of whether minors can give legal consent to sexual intercourse, our Supreme Court stated “[i]n 1970, the Legislature created the crime of unlawful sexual intercourse with a minor (§ 261.5) and amended the rape statute (§ 261) so that it no longer included sex with a minor in the definition of rape. . . . As a result, the circumstances surrounding sexual intercourse with a minor became highly relevant, because this conduct might in some cases be a distinct and less serious crime than rape, particularly where the minor engages in the sexual act knowingly and voluntarily. . . . In making this change, the Legislature implicitly acknowledged that, in some cases at least, a minor may be capable of giving legal consent to sexual relations.” (*Tobias, supra*, at p. 333.)

But in *Tobias*, our high court was discussing section 261.5, which defines a minor as “a person under the age of 18 years.” In enacting section 261.5, our Supreme Court viewed the Legislature as “abrogating the rule that a girl under 18 is in all cases incapable of giving . . . legal consent.” (*Tobias, supra*, 25 Cal.4th at p. 334.) Our Supreme Court also noted “a minor might still be found incapable of giving legal consent to sexual intercourse in a particular case.” (*Id.* at pp. 333–334.)

Tobias does not support Brown’s assumption that minors under the age of 14 can legally consent to sexual activity. Instead, in *Soto*, our Supreme Court acknowledged the “long-standing presumption that children *under age 14* cannot give legal consent to sexual activity.” (*Soto, supra*, 51 Cal.4th at p. 248, fn. 11.) Our Supreme Court reiterated this point a number of times, noting the “long-standing precedent holding that a child under age 14 is legally incapable of consenting to sexual relations.” (*Id.* at p. 233.) It stated, “California law has long recognized that consent is not a defense when the victim of a sex crime is a child under age 14. . . . This incapacity was conclusively presumed notwithstanding any ‘actual consent’ the child may have conveyed.” (*Id.* at p. 247.)

Based on these broad statements, we reject Brown's contention that *Soto* was limited to cases charging the defendant with committing a lewd or lascivious act on a child. Based on the presumption that consent is not a defense when the victim of a sex crime is a child under the age of 14, the court was not required to instruct the jury regarding whether Brown actually and reasonably believed J. consented to his conduct. (*Soto, supra*, 51 Cal.4th at p. 247.)

In any event, there was no evidence to support an instruction on this defense. During his police interview, Brown never claimed he believed J. consented to his conduct. Instead, he expressed remorse about what he did to J. He said he had an alcohol problem, he was a sex addict, and he could not remember much of what happened. Brown hated himself for what he did to J., and he chose her because she was an easy target. J. testified Brown's acts of rape, sodomy, and oral copulation were performed without her consent and against her will. There was simply no evidence to warrant an instruction regarding whether Brown believed J. consented to his conduct. Accordingly, we do not address Brown's arguments that he was prejudiced by the error, or that it violated his right to due process.

VII.

The Court Did Not Err by Instructing the Jury on Consciousness of Guilt

Brown contends the court's instruction based on CALCRIM No. 362 violated his right to due process because it permitted the jurors to impermissibly infer his guilt based on evidence of false statements. The Attorney General responds Brown forfeited the argument by failing to request clarifying language. To forestall Brown's claim of ineffective assistance of counsel, we consider his argument on its merits.

The court instructed the jury that "[i]f the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Brown argues this instruction permitted the jury to draw an impermissible inference of guilt based on his false statements to police, but Brown acknowledges that the California Supreme Court rejected a similar challenge to a predecessor consciousness of guilt instruction. In *People v. Crandell* (1988) 46 Cal.3d 833,⁸ “[t]he jury was instructed that a false or deliberately misleading statement by defendant concerning the charge upon which he was being tried (CALJIC No. 2.03) . . . could be considered ‘to prove a consciousness of guilt’ but was not ‘sufficient of itself to prove guilt’ and that its weight and significance, ‘if any,’ were matters for the jury’s determination.” (*People v. Crandell*, at p. 870.)

Our Supreme Court concluded the instruction did not direct or compel the drawing of impermissible inferences regarding the defendant’s mental state at the time of the offense, noting that a “reasonable juror would understand ‘consciousness of guilt’ to mean ‘consciousness of some wrongdoing’ rather than ‘consciousness of having committed the specific offense charged.’ ” (*People v. Crandell*, *supra*, 46 Cal.3d at p. 871.) Furthermore, the instruction advised “the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and [it] caution[ed] that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense.” (*Ibid.*)

Since its initial decision in *People v. Crandell*, the California Supreme Court has “repeatedly rejected” the argument that “consciousness of guilt instructions like CALJIC No. 2.52 (and see . . . CALCRIM No. 362) invite the jury to draw irrational and impermissible inferences with regard to a defendant’s state of mind at the time the offense was committed.” (*People v. Howard* (2008) 42 Cal.4th 1000, 1021; *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) We are, of course, bound by our Supreme Court’s determination. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.)

⁸ Abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.)

Brown attempts to distinguish these cases by arguing the instruction provided to his jury permitted them to impermissibly infer Brown was “ ‘*aware of his guilt of the crime.*’ ” Brown argues “a jury instruction suggesting the defendant is ‘aware of his guilt’ is not equivalent to a more vague, impersonal suggestion of ‘a consciousness of guilt.’ ” A similar argument was considered and rejected in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, in which the court held that use of the word “aware” in CALCRIM No. 372 was synonymous with “consciousness” as used in CALJIC. Nos. 2.06 and 2.52. (*People v. Hernandez Rios*, at pp. 1158–1159.) We agree with *Hernandez Rios*. Furthermore, Brown’s jury was specifically instructed that evidence that Brown made a false or misleading statement regarding the charged crime “cannot prove guilt by itself.” Because there was no error in the jury instruction based on CALCRIM No. 362, we do not address Brown’s argument he was prejudiced by the error.

VIII.

The Court Did Not Abuse Its Discretion in Imposing a Restitution Fine

In sentencing Brown, the court imposed a maximum restitution fine of \$10,000 pursuant to section 1202.4. Brown argues the jury should have determined the facts on which the amount of the fine was based. We reject this argument.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*)). “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (*Blakely v. Washington* (2004) 542 U.S. 296, 303.) *Apprendi* applies to the imposition of criminal fines. (*Southern Union Co. v. United States* (2012) 567 U.S. 343, 349.)

In *People v. Kramis* (2012) 209 Cal.App.4th 346 (*Kramis*), the court held that *Apprendi* did not apply to the imposition of a \$10,000 restitution fine under former section 1202.4, subdivision (b) because “the trial court exercise[d] its discretion within a statutory range.” (*Kramis*, at p. 351.) As *Kramis* explained, “the trial court was required

to impose a restitution fine in an amount between \$200 and \$10,000. The \$10,000 section 1202.4, subdivision (b) restitution fine imposed in the present case was within that statutory range. The trial court did not make any factual findings that increased the potential fine beyond what the jury’s verdict—the fact of the conviction—allowed. Therefore, *Apprendi* . . . do[es] not preclude its imposition.” (*Kramis*, at pp. 351–352.)

The same argument applies here. At the time of Brown’s offenses, former section 1202.4, subdivision (b)(1) required the court to impose a restitution fine in an amount between \$200 and \$10,000.⁹ The fact of Brown’s conviction by the jury triggered the court’s duty to impose a restitution fine within this statutory range. (*Kramis*, *supra*, 209 Cal.App.4th at pp. 349–350.) Citing *Kramis* with approval, our Supreme Court recently confirmed that the imposition of a restitution fine in excess of section 1202.4, subdivision (b)’s minimum does not violate *Apprendi* or subsequent federal decisions interpreting it. (*People v. Henriquez* (2017) 4 Cal.5th 1, 47–48.) *Henriquez* compels us to reject Brown’s argument that it was improper for the court to impose a \$10,000 restitution fine. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.)

Even if we were not bound by *People v. Henriquez*, we would reject Brown’s argument. He claims that *Kramis* was incorrectly decided. According to Brown, “the statutory maximum under section 1202.4 is \$200 because under subdivision (c) of the statute, the trial court is required to determine an ability to pay if it is to impose an amount above \$200.” Brown misconstrues the statute. First, at the time of Brown’s offenses, it provided the court “may” consider a defendant’s inability to pay in increasing the amount of the restitution fine above the statutory minimum, but the court was not required to do so. (Former § 1202.4, subd. (c).) Second, the defendant had the burden of demonstrating an inability to pay the fine. (Former § 1202.4, subd. (d).) Thus, the court was not required, as Brown contends, to determine a defendant’s ability to pay before imposing a fine greater than \$200. Because Brown’s construction of the statute is incorrect, we do not address his argument that the court’s error was reversible per se.

⁹ (See Stats. 2000, ch. 1016, § 9.5, pp. 7464, 7470 (operative Jan. 1, 2000), see also Stats. 2004, ch. 223, § 2, p. 2425 (effective Aug. 16, 2004).)

IX.

Brown Is Entitled to Presentence Conduct Credits of 76 Days

Brown argues the court erred in determining he was not entitled to presentence conduct credits under section 2933.1. The Attorney General concedes Brown should be awarded conduct credits limited to 15 percent of his period of confinement, which entitles Brown to 76 days of conduct credits. We agree.

“Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, ‘a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. [Citations.]’ [Citation.]” (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) Section 2933.1, subdivision (c), limits the conduct credits available under section 4019. It provides, in pertinent part, that “[n]otwithstanding Section 4019 . . . , the maximum credit that may be earned . . . following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).” Subdivision (a) provides that “any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit” (§ 2933.1, subd. (a).)

Here, Brown was charged with, and convicted of, aggravated sexual assault of a child by means of forcible rape (former § 269, subd. (a)(2), § 261, subd. (a)(2)), forcible sodomy (former §§ 269, subd. (a)(3), 286), and forcible oral copulation (former § 269, subd. (a)(4), former § 288a). The violent felonies listed in subdivision (c) of section 667.5 include forcible rape, forcible sodomy, and forcible oral copulation. (§ 667.5, subds. (c)(3)–(5).) However, the crime of aggravated sexual assault of a child in violation of section 269 is not listed in subdivision (c) of section 667.5.

Nevertheless, we conclude that section 2933.1, subdivision (c) still applies to Brown. In *People v. Jimenez* (2000) 80 Cal.App.4th 286, 291, when considering whether sentences for convictions of two counts of aggravated sexual assault by means of sodomy should be served consecutively under section 667.6, subdivision (d), the court determined

“that violation of section 286 is one of the predicate offenses of section 269; one committing a forcible sodomy offense with the prescribed age disparity violates section 269. When the jury found defendant had violated section 269 under the circumstances presented here, it necessarily found he had violated section 286 and he had done so by force or fear. Thus, the factual predicate necessary to apply section 667.6, subdivision (d) was proved beyond a reasonable doubt.” (*People v. Jimenez*, at p. 291.)

The same reasoning applies here. The jurors were specifically instructed that “[r]ape by force or fear . . . is a lesser included offense to Aggravated Sexual Assault of a child—Rape, as charged in Count 1,” that “[s]odomy by force or fear . . . is a lesser included offense to Aggravated Sexual Assault of a Child—Sodomy, as charged in Count 2,” and that “[o]ral [c]opulation by force or fear . . . is a lesser included offense to Aggravated Sexual Assault of a Child—Oral Copulation, as charged in” counts 3 and 4. When the jury convicted Brown of aggravated sexual assault of a child by means of forcible rape, forcible sodomy, and forcible oral copulation, the jury necessarily determined Brown had committed forcible rape, forcible sodomy and forcible oral copulation. Thus, the factual predicate necessary to apply section 2933.1, subdivision (c), was proved beyond a reasonable doubt. (*People v. Jimenez*, *supra*, 80 Cal.App.4th at p. 291.) Brown earned 511 days of actual custody credits, so he is entitled to 76 days of conduct credits. (§ 2933.1, subd. (c).)

X.

Brown Is Not Entitled to a Franklin Remand

Brown contends we should order a limited remand “for the purpose of providing Brown with a sufficient opportunity to create a record of information pertinent to his eventual youth offender parole hearing.” However, Brown was sentenced long after our Supreme Court’s decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), so we are not persuaded he is entitled to a *Franklin* remand.

“A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense.” (§ 3051, subd. (a)(1).)

“ ‘Controlling offense’ means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.” (§ 3051, subd. (a)(2)(B).) “A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing” (§ 3051, subd. (b)(2).) “[T]he board, in reviewing a prisoner’s suitability for parole . . . , shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§ 4801, subd. (c).)

In *Franklin*, the defendant was 16 years old when he committed murder and the trial court was obligated by statute to impose two consecutive 25 years to life sentences. (*Franklin, supra*, 63 Cal.4th at p. 269.) The defendant was sentenced in 2011, but, after his sentencing, the Legislature enacted Senate Bill No. 260, which became effective January 1, 2014, and which added section 3051 and section 4801, subdivision (c) to the Penal Code. (*Franklin, supra*, at pp. 276, 282.) Our Supreme Court determined it was not clear if the defendant “had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing.” (*Franklin*, at p. 284.) Thus, the Supreme Court remanded the matter to the trial court for a determination of whether the defendant “was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*Ibid.*)

Here, Brown sexually abused J. between September 1, 2003 and September 30, 2005, and Brown was born on September 10, 1984. Therefore, Brown was between 19 and 21 years old when the offenses occurred. Brown’s controlling offense resulted in a sentence of 15 years to life. (§ 3051, subd. (a)(2)(B).) Thus, Brown will be eligible for a youth offender parole hearing during his 20th year of incarceration. (§ 3051, subd. (b)(2).)

However, Brown was sentenced on February 14, 2017, but sections 3051 and 4801 were added to the Penal Code years earlier, on January 1, 2014. (*Franklin, supra*, 63 Cal.4th at p. 276.) Effective January 1, 2016, these statutes were amended to apply to offenders under 23 years of age. (See §§ 3051 and 4801, subd. (c), as amended by Stats. 2015, ch. 471 (§§ 1–2.) Our Supreme Court decided *Franklin* on May 26, 2016. (*Franklin*, at p. 261.)

Thus, when Brown was sentenced, sections 3051 and 4801 were already added to the Penal Code, and had been amended to encompass offenders like him. Unlike the defendant in *Franklin*, Brown “had both the opportunity and incentive to put information on the record related to a future youth offender parole hearing. [¶] Under these circumstances, there is no reasonable basis for concluding . . . [Brown] was denied a sufficient opportunity to put on the record the kinds of information that . . . sections 3051 and 4801, subdivision (c) deem relevant at a youth offender parole hearing.” (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089.) In his reply brief, Brown fails to address the Attorney General’s argument that he had adequate notice of the opportunity to develop a record for later use at his eventual youth offender parole hearing. We deny his request for a *Franklin* remand.¹⁰

XI.

No Ineffective Assistance of Counsel

Brown’s final argument is that “[s]hould this court hold trial counsel forfeited any of the asserted instructional, evidentiary, misconduct or sentencing errors noted above, it is Brown’s alternate position his attorney provided constitutionally inadequate assistance

¹⁰ In our order to show cause filed in Brown’s habeas corpus proceeding (*In re Jeremy Brown on Habeas Corpus*, Case No. A153533), we find Brown has articulated a prima facie case that his trial counsel provided ineffective assistance by failing, at Brown’s sentencing hearing, to develop a record for use at Brown’s eventual youth offender parole hearing. The relief requested in the habeas corpus proceeding is a remand so that Brown can create the necessary record. Our determination here, in Brown’s direct appeal, that he is not entitled to a *Franklin* remand, should not be construed to deny Brown the opportunity to create a record for his youth offender parole hearing in the habeas corpus proceeding.

of counsel in failing to make the necessary objections.” Here, as explained *ante*, Brown forfeiting the argument that the prosecutor engaged in misconduct, but we nevertheless considered Brown’s argument on its merits and concluded Brown was not prejudiced by the prosecutor’s remarks. In addition, we have considered and rejected all of Brown’s other claims of error. Therefore, in this direct appeal from his judgment of conviction, Brown cannot establish his trial counsel performed deficiently by failing to object, and if counsel had objected it is not reasonably probable the result would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

DISPOSITION

We direct the superior court to modify the abstract of judgment to add 76 days of conduct credits. The superior court must prepare and forward to the California Department of Corrections and Rehabilitation an abstract of judgment with this modification. In all other respects, we affirm the judgment.

Jones, P. J.

We concur:

Needham, J.

Bruiniers, J.*

A150891

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.